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NO. 82-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH P. COUNIHAN, JR., As Temporary Administrator of the Estate of ANNE FAHEY COUNIHAN, Deceased, et al.,

Appellants,

v.

DEPARTMENT OF TRANSPORTATION OF GEORGIA, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF GEORGIA

MOTION TO DISMISS OR TO AFFIRM

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DEPARTMENT OF TRANSPORTATION
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ON APPEAL FROM THE COURT OF APPEALS OF GEORGIA

MOTION TO DISMISS OR TO AFFIRM

The Department of Transportation, an agency of the State of Georgia, named as an Appellee herein, respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of Georgia, on which judgment the Supreme Court of Georgia denied a Writ of Certiorari, on the grounds that this appeal does not raise a substantial federal question; that the issues raised in this appeal were not timely or properly raised in the lower courts and were not expressly ruled upon; and that the judgment in this case rests upon an adequate non-federal basis.

QUESTIONS PRESENTED

1.

Whether Appellant's appeal presents a substantial federal question.

2.

Whether the questions presented in Appellant's Jurisdictional Statement were timely or properly raised and expressly passed on by the state appellate court.

3.

Whether the judgment appealed from rests on an adequate non-federal basis.

STATEMENT OF THE CASE

Appellant attacks the constitutionality of two Georgia statutes on the grounds that they allegedly deny due process of law and equal protection of the law guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article II, Sections I and II of the Constitution of the State of Georgia of 1976. (Ga. Code Ann. Sections 2-101 and 2-203). The statutes under attack (Ga. Laws 1973, pp. 947, 983, as amended [Ga. Code Ann. §§ 95A-304 and 95A-305]) relate to the ability of the Department of Transportation to bring suits and be sued in such actions as are permitted by law. These statutes further provide that the Department shall defend certain actions which are brought against counties of the State of Georgia on causes of action arising upon public roads which are part of the State Highway System.

Appellant claims that these statutes are unconstitutional in light of another statute of this State which provides for the liability of municipalities negligent in the performance

of their ministerial duties. (Ga. Code § 69-301).

The factual setting, briefly stated, is as follows: Appellant brought suit against the Department of Transportation, Chatham County, Georgia, and several individual employees of Chatham County seeking damages for the alleged wrongful death of Appellant's decedent. The circumstances surrounding the death were that the decedent lost control of her vehicle on an allegedly icy bridge, and Appellant alleged this condition was the result of the negligence of the various Appellees herein.

The Department of Transportation filed a Motion to Dismiss the wrongful death action against it on the ground that it was immune from this suit under the doctrine of sovereign immunity. This Motion was unopposed. Appellant, for the first time on appeal, sought to defend against this immunity by contending that Georgia Code Annotated Sections 95A-304 and 95A-305 amounted to a waiver of the Department's sovereign immunity and that these sections expressly authorized the action *sub judice*.

As evidenced by the decision of the Georgia Court of Appeals (erroneously attributed to the Supreme Court of Georgia in Appendix "A" of the Appellant's Jurisdictional Statement), Appellant was unsuccessful in his assertion that these statutes amounted to a waiver of sovereign immunity.

For the first time in his appeal to the Georgia Court of Appeals, Appellant alternatively sought to raise, in a very superficial manner, the constitutionality of Georgia's sovereign immunity. Appellant merely contended that to allow an action against a municipality for negligence arising out of its ministerial duties but not to allow a similar action against the State itself, or a county thereof,

constitutes a denial of due process and equal protection. This issue was not expressly ruled upon by the Georgia Court of Appeals. *See* Appendix "A" of Appellant's Jurisdictional Statement.

Appellant sought a writ of certiorari from the Supreme Court of Georgia to the Court of Appeals of Georgia. This application was denied. *See* Appendix "C" to Appellant's Jurisdictional Statement.

A. THE APPEAL DOES NOT PRESENT THIS COURT WITH A SUBSTANTIAL FEDERAL QUESTION.

Under the doctrine of sovereign immunity, suits cannot be maintained against the State of Georgia or any of its agencies unless the State has given express legislative consent to such suits. *Crowder v. Department of State Parks*, 228 Ga. 436 (1971), *cert. denied*, 406 U.S. 914 (1972); *Maddox v. Coogler*, 224 Ga. 806 (1968); *Azizi v. Board of Regents of the University System*, 132 Ga. App. 384 (1974), *cert. denied*, 233 Ga. 487 (1975); *Erbel v. Forrester*, 194 Ga. 439 (1942); *Roberts v. Barwick*, 187 Ga. 691 (1939); *Counihan v. Department of Transportation*, 162 Ga. App. 374 (1982); *National Distributing Company, Inc. v. Department of Transportation*, 157 Ga. App. 789, *aff'd* 248 Ga. 451 (1981); *Goolsby v. Regents of the University System*, 141 Ga. App. 605 (1977); *Meadows Motors, Inc. v. Department of Administrative Services*, 141 Ga. App. 224 (1977); *National Distributing Co. v. Oxford*, 103 Ga. App. 72 (1961). The firm foundation that the doctrine of sovereign immunity has in Georgia by these judicial rulings has now been given constitutional status. *Clark v. State of Georgia*, 240 Ga. 188 (1977); *Azizi v. Board of Regents of the University System*, 233 Ga. 487, 488 (1975).

The applicability of the doctrine of sovereign immunity to the Department of Transportation (formerly State Highway Department) has long been recognized by the courts of Georgia. *Tounsel v. State Highway Department*, 180 Ga. 112, 116 (1934); *State Highway Department v. Barrett*, 124 Ga. App. 703 (1971); *Andrews v. Department of Transportation*, 133 Ga. App. 78 (1974); *Palmerio v. Mayor &c of Savannah*, 145 Ga. App. 429, 432 (1978); *Sikes v. Candler County*, 247 Ga. 115 (1981); *National Distributing Co., Inc. v. Department of Transportation*, 157 Ga. App. 789 (1981). Furthermore, it has consistently been held by the courts of Georgia that neither Georgia Code Annotated Section 95A-304 nor Georgia Code Annotated Section 95A-305 constitutes a waiver of the Department of Transportation's sovereign immunity in tort lawsuits. These are the very statutes which Appellant seeks to bring under constitutional scrutiny.

In *Andrews v. Department of Transportation*, 133 Ga. App. 78 (1974), it was argued that Georgia Code Annotated Section 95A-304 (*see* Appendix "E" of Appellant's Jurisdictional Statement) "shows a clear legislative intent to waive the doctrine of sovereign immunity as to the Department of Transportation." 133 Ga. App. at p. 79. The court disagreed, holding that the section was nothing more than a codification of the holding in *Tounsel v. State Highway Department*, 180 Ga. 112, 119 (1935), and was not intended by the General Assembly to waive the Department's immunity. There is no law in existence in the State of Georgia permitting suits against the Department of Transportation in tort. *See Sikes v. Candler County*, 247 Ga. 115 (1981). However, the Department may be sued and held liable for taking or damaging private property for public purposes without payment of just com-

pensation. Article I, Section III, Paragraph I of the Constitution of Georgia of 1976 (Ga. Code Ann. § 2-301). Likewise, the language of Georgia Code Annotated Section 95A-305 (formerly Section 95-1710) does not constitute a waiver of a county's immunity from liability because that Code Section specifically limits liability for damages "under existing laws." *Williams v. Georgia Power Co.*, 233 Ga. 517, 518 (1975).

In *Beers v. State of Arkansas*, 61 U.S. 527 (1857), Mr. Justice Taney stated:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." *Beers v. State of Arkansas*, 61 U.S. 527 at p. 529.

It is submitted that Georgia, by enacting Georgia Code Annotated Sections 95A-304 and 95A-305, has done precisely what this Court was considering in the above-quoted language from *Beers*, *supra*. Georgia Code Annotated Section 95A-304 provides that the Department of Transportation may be sued in "such actions as are permitted by law." Georgia Code Annotated Section 95A-305 sets out the exclusive procedure for suing the Department of Transportation. *Sikes v. Candler County*, 247 Ga. 115 (1981).

This Court has held that such matters are strictly within the purview of state law and do not require the inter-

vention or scrutiny of this Court. In *Palmer v. State of Ohio*, 248 U.S. 42 (1918), this Court was called upon to construe the following language of the Ohio Constitution:

> "Suits may be brought against the State in such Courts and in such manner as may be provided by law." Compare with Ga. Const., Art. IV, Sec. V, Par. I (Ga. Code Ann. § 2-3401) and Ga. Laws 1973, pp. 947, 983, as amended (Ga. Code Ann. § 95A-304).

In *Palmer, supra*, this Court held as follows:

> "The State Supreme Court held that this amendment is not self-executing, and that the General Assembly of the State having failed to designate the Courts and the manner in which such suits might be brought, effective consent to sue had not been given. This decision, the plaintiffs in error claim, vaguely and indefinitely, somehow deprives them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.
>
> "The right of individuals to sue a State, in either a federal or state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. *Beers v. Arkansas*, 20 How. 527; *Railroad Company v. Tennessee*, 101 U.S. 337; *Hans v. Louisiana*, 134 U.S. 1. Whether Ohio gave the required consent must be determined by the construction to be given to the constitutional amendment quoted, and this is a question of local state law, as to which the decision of the State Supreme Court is controlling with this court, no federal right being involved. *Elmendorf v. Taylor*, 10 Wheat. 152, 159; *Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 116; *Memphis Street Ry. Co. v. Moore*, 243 U.S. 299, 301.
>
> "The further claim that the plaintiffs in error are deprived of their property without compensation in

violation of the Fifth Amendment to the Constitution of the United States, is palpably groundless. *Barron v. Baltimore*, 7 Pet. 243, 250; *Brown v. New Jersey*, 175 U.S. 172, 174.

"No federal question being presented by the record, the motion to affirm is denied and this court, *sua sponte*, dismisses the writ of error for want of jurisdiction." *Palmer v. State of Ohio*, 248 U.S. 32, at pp. 33 and 34.

Because the grant or denial of permission to sue the sovereign State is a matter which addresses itself purely to the legislative grace of the State, no federalqu estion can arise. This privilege, when conferred, does not arise under the Constitution or laws of the United States, and neither does denial of this privilege. This being a matter of legislative grace, no denial of due process of law can exist, there being no federal rights to be protected.

Nor can there be a denial of equal protection by the application of Georgia Code Annotated Sections 95A-304 and 95A-305, when considered in light of Georgia Code Section 69-301 (*see* Appendix "E" to Appellant's Jurisdictional Statement). This latter statute applies only to municipal corporations, not to counties or the State itself. There is a broad legal distinction between the sovereign State of Georgia, its agencies and counties on the one hand and municipal corporations on the other. The Department, as an agency of the State, is an agent or servant of the State; it is part of the sovereign itself. *Tounsel v. State Highway Department*, 180 Ga. 112, 116 (1935).

" 'Counties are subdivisions of the state government to which the state parcels its duty of governing the people . . . and are arms of the state, created, organized, and existing for civil and political purposes,

> particularly for the purpose of administering locally the general powers and policies of the state. On the other hand, municipalities are creatures of the legislature, and their existence may be established, altered, amended, enlarged or diminished, or utterly abolished by the legislature. [Cits.]' *Troup County Electric Membership Corp. v. Ga. Power Co.*, 229 Ga. 348, 352 (1972)." *Miree v. United States*, 242 Ga. 126, 133 (1978).

Because of the vast distinction between municipal corporations and the sovereign, there can be no denial of equal protection by permitting limited suits against municipalities which are not permitted against the sovereign itself. Georgia Code Section 69-301 is not more than a codification of common law principles laid down in Georgia. *Collins v. The Mayor &c. of Macon*, 69 Ga. 542 (1882); *Rivers v. City Council of Augusta*, 65 Ga. 376 (1880). Neither the common law of Georgia, nor the statutory law of this State, has ever recognized a limited liability for the State or counties similar to that of municipalities contained in Georgia Code Section 69-301.

It is clear that the legislature may withhold permission to sue the State or its agencies, this being a mere privilege, with no attendant denial of equal protection of the law. *See Beers v. State of Arkansas*, 61 U.S. 527, 529 (1857).

B. THE QUESTION PRESENTED WAS NOT TIMELY OR PROPERLY RAISED AND WAS NOT EXPRESSLY PASSED ON BY THE COURT BELOW.

It is submitted that the question Appellant seeks to raise in this Appeal was never properly raised in the state courts, as required by Rule 16.1(b) of this Court. As can be seen in the record of this case, the issue of whether

Georgia Code Annotated Sections 95A-304 and 95A-305 violate due process and equal protection in light of Georgia Code Annotated Section 69-301 was never raised by Appellant. Rather, Appellant sought to attack the doctrine of sovereign immunity directly on these grounds. Even this constitutional attack was not launched until the case had reached the Georgia Court of Appeals. This rendered the constitutional attack untimely under Georgia law. *Allison v. Fulton-DeKalb Hospital Authority*, 245 Ga. 445 (1980); *Yield, Inc. v. City of Atlanta*, 239 Ga. 578 (1977). As held in *Palmer v. Ohio*, 248 U.S. 32 (1918), this untimely attack was palpably groundless.

Furthermore, neither the Court of Appeals of Georgia, nor the Supreme Court of Georgia, expressly ruled upon the precise question raised by the Appellant in his Jurisdictional Statement.

In view of the attempt by Appellant to raise this issue for the first time on appeal to this Court, it is respectfully submitted that this Court lacks jurisdiction to entertain this matter. *Orr v. Orr*, 440 U.S. 268, 274 (1978); *Edelman v. California*, 344 U.S. 357, 358 (1952); *see also*, C. Wright, *Federal Courts* 541-542.

C. THE JUDGMENT APPEALED FROM RESTS UPON AN ADEQUATE NON-FEDERAL BASIS.

In *Herb v. Pitcairn*, 324 U.S. 117 (1944), this Court stated:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [cits.] . . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

Herb v. Pitcairn, 324 U.S. 117 at pp. 125 and 126.

With this principle in mind, the Court's attention is again directed to the explicit words of this Court in *Palmer v. Ohio*, 248 U.S. 32 (1918):

> "The right of individuals to sue a State, in either a federal or state court cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. *Beers v. Arkansas*, 20 How. 527 (61 U.S. 527) (1857); *Railroad Company v. Tennessee*, 101 U.S. 337; *Hans v. Louisiana*, 134 U.S. 1. Whether Ohio gave the required consent must be determined by the construction given to the constitutional amendment quoted, and this is a question of local state law . . . *no federal right being involved.*" *Palmer v. Ohio*, 248 U.S. 32 at p. 34. (Emphasis added).

The Appellant would have this Court find a federal question where clearly none exists. State sovereign immunity is, and always has been, a matter of state law; and the waiver of that immunity is entirely up to the State involved. Simply stated, sovereign immunity and the conditions under which it may be waived do not involve any federal rights which could invoke the jurisdiction of this Court.

CONCLUSION

Appellant's appeal does not involve any substantial federal questions. Appellant attempts to create a federal question by claiming that the distinction between the sovereignty of the State and its counties on the one hand and the status of municipal corporations on the other, with relation to their respective sovereign and governmental immunities, is invalid as a denial of equal protection and due process of law under the United States Constitution. This claim is wholly without merit.

The major thrust of Appellant's case in the lower State appellate courts was that the doctrine of sovereign immunity was violative of the due process and equal protection clauses of the Fourteenth Amendment, not that Georgia Code Annotated Sections 95A-304 and 95A-305 were unconstitutional, as Appellant now claims. As seen by the decision of the Court of Appeals of Georgia, Appellant originally claimed that these two sections constituted a *waiver* of the Department of Transportation's sovereign immunity.

It is submitted that the real intent of Appellant in this case is to attack state and county sovereign immunity in Georgia and not the two statutes facially under attack. A similar attack was made upon the sovereign immunity of Pennsylvania in *O'Neill v. Pennsylvania*, 459 F.2d 1 (3rd Cir. 1972). Therein the Circuit Court of Appeals held as follows:

> "The appellants would have us find federal question jurisdiction, 28 U.S.C. § 1331, on the basis of their claim that the doctrine of sovereign immunity is a violation of the due process and equal protection clauses of the fourteenth amendment. . . . In any event the fourteenth amendment claim seems frivolous in view of *Palmer v. Ohio*, 248 U.S. 32, 34, 39 S.Ct. 16, 63 L.Ed. 104 (1918)." *O'Neill v. Pennsylvania*, 459 F.2d 1 at p. 2.

It is urged that the Appellant's appeal in this case, both as to the constitutionality of the Georgia statutes and as to Appellant's real intent, i.e. the destruction of sovereign immunity in Georgia, is similarly without merit.

Finally, as shown above, the Appellant failed to properly raise the constitutional issues in accordance with the law of Georgia, having raised them for the first time on appeal. As seen by the decision appealed from, the State

court has not expressly ruled upon the question presented by the Appellant in his Jurisdictional Statement.

Respectfully submitted this 18th day of October, 1982.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter, pursuant to Rule 28(c) of the Rules of the Supreme Court of the United States, and counsel for all other parties, with copies of "Motion to Dismiss or to Affirm" by depositing same in the United States Mail with sufficient postage for first class delivery in envelopes properly addressed to:

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